Supreme Court, U.S.
MAY 24 1993
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92-1869

IN THE
SUPREME COURT OF THE UNITED STATES
October Term,1992
(RECORD #)

WALTER H. BULLWINKLE
Petitioner

v.

STATE OF ALASKA
Respondent

ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

WALTER H.BULLWINKLE PRO SE
69 Timberland Drive
Fairbanks, Alaska 99701
(907) 456-4521

The questions presented for review are:

1. Under the provisions of RS 2477 (43 USC 932) could the proffered right-of-way grant be accepted by Act of the Alaska Territorial Legislature Chapter 19 SLA 1923 with no actual or even planned road construction.

2. While Section 9 of the Alaska Organic Act (48 USC Sec. 77) prohibited the Alaska Territorial Legislature from interfering with the primary disposal of the soil, did it confer sufficient power to dedicate and reserve to itself easements along all section lines in Alaska before physically possessing the land by constructing a public road or trail?

3. Under the provisions of RS 2477 could the right-of-way grant be exercised on private land, when the first act of physical appropriation occurred more than forty years after the land was conveyed from Federal ownership and more than fifty years after the land was segregated from public land status and ten years after RS 2477 was revoked in 1976 by FLPMA.

Reference is made to the Secretary of the Interior's defeat of the attempt to install section line easements in Washington State (25 I. D. 466 1898). The Amicus Curiae Brief of the United States prepared by the Justice Department for the Greenhouse Case (A 85-630) in 1986. Alaska Attorney General's Opinion #11, 1962. Alaska Attorney General's Letter to the Corps of Engineers (App. Page 19 to Page 22).

THE JUDGMENT of the Ninth Circuit was entered on February 22, 1993.

TITLE 28 USC SECTION 1254 confers jurisdiction to review the judgment by writ of certiorari if filed within 90 days of the final decision.

AMENDMENT FIVE states "Nor shall private property be taken for public use without just compensation."

AMENDMENT FOURTEEN states, "Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law."

Statement of the Case:

Congress in RS 2477 offered a grant of right-of-way for construction of public roads (43 USC Sec. 77). The Territory exceeded the scope of the powers granted by Congress and passed Ch. 19 SLA 1923 which dedicated and reserved to itself easements along all section lines in Alaska. This resulted in a significant expansion of scope of the acceptance provisions of the offered right-of-way grant by deleting any physical act of appropriation and ignoring the topographic limitations of road construction. (App. Page 13 to Page 14)

Since 1923, the Territory and subsequently the State of Alaska has used this erroneous dedication and reservation to defeat land titles earned under the Federal Homestead Act of 1862. The Courts of Alaska have consistently protected the State in this matter, and the State has prevented the issue from being heard by Federal Courts by either refusing to become a party to a suit between third parties (Alaska Greenhouse, Inc. vs. Municipality of Anchorage, et al, (A 85-630) or hiding behind the 11th Amendment which

bars Federal courts jurisdiction over cases brought to recover damages from the State.

Since the Territory and subsequently the State has never exercised this dedication and reservation against the Federal government, the Federal government has never been a party to suits on the matter.

Alaska's Superior Court confirmed the section line easement and gave the State the easement by summary judgment. The Federal District and the Ninth Circuit Appeals Court had to give full faith and credit to Superior Court's decision even if erroneous. Title 45 U.S.C. 1701 and Title 28 U.S.C. 1291 are the basis respectively for jurisdiction of the District Court and the Ninth Circuit Appeals Court. (App. Page 1 to Page 11)

The State has obfuscated the matter by consistently holding that the existence of an RS 2477 right-of-way grant is a matter of State Law, while the real issue remains that of interpretation of Federal Law to ascertain the clear intent of Congress as to the need for physical appropriation of public lands as the necessary act of accepting the RS 2477 grant offer. (App. Page 13 to Page 14)

ARGUMENTS:

1. Plain reading of RS 2477 shows that physical appropriation of the public land is a necessary element of acceptance of the proffered grant. (App. Page 13 to Page 14)

2. The Alaska Organic Act prohibited the Territory from interfering with the primary disposal of the soil.

3. RS 2477 was revoked by the Federal Land Policy & Management Act in 1976, and Act of 1923 by the Territory in 1949.

4. Section line easements are exercised only against private ownership derived from the 1862 Homestead Act and other Federal Settlement Acts.

5. The impression of section line easements on private land conveyed by Federal patent constitutes a collateral attack on the Federally granted land title, rather than the direct proceeding as required. (App. Page 20 to Page 21)

6. The section line easement myth is perpetuated by:

a. The State refusal to become a party to third party suits.

b. Initiating condemnation proceedings and awarding only token land values and then claiming Article 11 as a defense to limit Federal Court jurisdiction.

c. Careful avoidance of exercising the section line easement across Federally managed lands, thus precluding a Federal challenge.

It was never Congress intent to offer a future speculative grant without regard for current needs and topographic feasibility nor to cloud the land titles forever that Congresss offered under the Homestead and Alaska Settlement Acts.

Walter H. Bullwinkle prays for a writ and a favorable decision either by per curiam decision based on the briefs or by granting a writ of certiorari.

Respectfully submitted,

Walter H. Bullwinkle

Walter H. Bullwinkle, Pro Se

69 Timberland Drive
Fairbanks, AK 99701
(907) 456-4521

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APPENDIX

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APPENDIX

IN THE DISTRICT/SUPERIOR COURT

FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, Plaintiff, v. 0.947 acres more or less; WALTER H. BULLWINKLE; FAIRBANKS NORTH STAR BOROUGH; and also all other persons or parties unknown claiming a right, title, estate, lien, or interest in the real estate described in the complaint in this action, Defendants.	Case No. 4FA-86-2479 Civil ORDER FOR MOTION TO RECONSIDER RULING

This matter comes before the Court upon the Motion for Reconsideration by Mr. Bullwinkle. The Court has considered the Motion and it is hereby denied.

DATE: September 19, 1991

/s/ NIESJE J. STEINKRUGER
DISTRICT/SUPERIOR COURT JUDGE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, Plaintiff, v. 0.947 acres more or less; WALTER H. BULLWINKLE; FAIRBANKS NORTH STAR BOROUGH; and also all other persons or parties unknown claiming a right, title, estate, lien, or interest in the real estate described in the complaint in this action, Defendants.	Project No. RS-RRS-M-000S(52) Parcel No. 6 4FA-86-2479 Civil ORDER CONFIRMING SECTION LINE EASEMENT

Based on the state's Motion for Summary Judgment - Section Line Easement,

IT IS HEREBY ORDERED that the existence of the section line easement for Peger Road is hereby confirmed.

IT IS FURTHER ORDERED that defendant Walter H. Bullwinkle is entitled to nominal compensation for the taking of the fee underlying the section line easement. The court has determined nominal compensation to be $100.

DATED: June 23, 1991

/s/ NIESJE J. STEINKRUGER
SUPERIOR COURT JUDGE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	Project No. RS-RRS-M-000S(52)
	)	Parcel No. 6
v.	)	4FA-86-2479 Civil
0.947 acres more or less; WALTER H. BULLWINKLE; FAIRBANKS NORTH STAR BOROUGH; and also all other persons or parties unknown claiming a right, title, estate, lien, or interest in the real estate described in the complaint in this action,	)	MOTION TO RECONSIDER RULING
	)	
Defendants.	)	

Abe Lincoln was, among other things, a lawyer. He had a riddle which ran like this, "If you call a dog's tail a leg, how many legs does he have?" To the answer Five, he would say "No only four. Calling a dog's tail a leg doesn't make it a leg." The State has the Court apparently believing that if enough officers of the Court call an obviously INVALID act valid it becomes valid. The invalidity of the Act of 1923 is a fact and not a matter of opinion.

Along with acts not consistent with the Constitution of the United States, the

Territorial Legislature was expressly forbidden to interfere with the transfer of title to land owned by the United States to persons or corporations who had complied with the regulations and were, therefore eligible to receive such title from the United States. Now, ask 'did the Act of 1923 interfere with such a transfer of title and thus exceed the limit of the scope of the power conferred upon the Alaska Territorial Legislature by the Organic Act which created it ten years before?' Since it appropriated a strip of land a mile long and thirty three feet wide from each full homestead it obviously exceeded its power and was, therefore, VOID. (See Black's Legal Dictionary ORGANIC ACT)

The Act of 1923 is a colossal bluff perpetrated on the good people of Alaska by a corrupt Legal Department which has been making a "solemn mockery of the United States Constitution" for seventy years and the Alaska State Constitution since its inception, in that it violates the fifth amendment of the United States Bill of Rights and the 19th of the

Alaskan Bill of Rights which forbid the taking of private property for public use without compensating the owner.

Ignoring, as the Court has done, the Amicus Curiae of the United States will not make it go away.

Robbing poor homesteaders and miners of their land would not entail anywhere near the stigma attached to the theft of the land allotted to the care of the mentally impaired, but the States should bear in mind that many of those who settled the Federal Homesteads are veterans of America's wars, and the preservation of their Constitutional Rights is a Federal concern.

By eliminating the Act of 1923 voluntarily, the State could, perhaps, avoid a scandal similar to the one provoked by the States attempt to steal the Mental Health Lands. Take the sage advice of President Truman, "When in doubt do the right thing, it will gratify some and astonish the rest."

/s/ Walter Bullwinkle
69 Timberland Drive
Fairbanks, AK 99701
456-4521

V

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

WALTER H. BULLWINKLE, Plaintiff, v. STATE OF ALASKA, Defendants.	)	Case No. 91-034 Civil ORDER

The State of Alaska filed a declaration of taking, and thereafter condemned, certain property of Walter H. Bullwinkle for a bike trail. The eminent domain proceeding was brought in state superior court. See AS 09.55.240 et seq. The primary issue was the amount of compensation to which Bullwinkle was entitled. The state offered only nominal compensation because it argued that the bulk of the property taken was within a federal right of way granted to the state by the federal government and accepted by the state pursuant to law. The state relied upon Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1225-27 (Alaska 1975). Bullwinkle argued that the state supreme court had misunderstood federal law. He

reasoned that the federal grant of a right of way could only be accepted by actual construction of a road and could not be accepted by a legislative enactment. The state superior court agreed with the state, followed Girves, and entered summary judgment against Bullwinkle. Thereafter, Bullwinkle filed an action in this court seeking to quiet title to the disputed property. The state moved to dismiss, and the case is now ripe for adjudication. Since the state relies on evidence outside the pleadings the motion to dismiss will be treated as a motion for summary judgment.

It is undisputed that the state superior court has jurisdiction over an eminent domain proceeding regarding land in Alaska. Consequently, the decisions of the state superior court are entitled to full faith and credit in this court. 28 U.S.C. §1738. That means that this court must apply the doctrines of Res Judicata and Collateral Estoppel to a decision of the state superior court in the same manner that the Alaska Supreme Court would

apply it. Marrese v. American Academy of Orthopedic Surgeons, 456 U.S. 373,380-81(1985). It seems clear that the Alaska Supreme Court would hold that Bullwinkle's action to quiet title in this court was barred by the prior state court judgment. See DeNardo v. Municipality of Anchorage, 775 P.2d 515,517(Alaska 1989). In DeNardo, the supreme court considered the related doctrines of Res Judicata and Collateral Estoppel. Regarding the latter, the court said that it precluded relitigation of issues which had actually been decided in the first action by a valid, final judgment where determination of the issue was essential to the judgment. An examination of the issues presented in the state court establishes that each of these elements is present. The superior court had jurisdiction over the property, the only issue concerned the compensation due Bullwinkle, in order to determine compensation the court had to determine whether the state had a valid right of way easement to part of the property and concluded that it did. Thus the determination

that the right of way was valid was essential to the superior court judgment. It is this determination that Bullwinkle wishes to relitigate in his action to quiet title. He argues that the state court was wrong in its determination of federal law because it relied upon Girves which misinterpreted a federal statute. Bullwinkle's argument can be broken down into two components: (1) This court should not follow the state decision because it was wrong; and (2) This court should not follow the state decision because it dealt with a question of federal not state law, i.e., the true meaning of a federal statute. To determine whether either of these arguments survives issue preclusion, we must look to state law. Marrese, 470 U.S. at 379-83. In DeNardo, the court addressed these issues and concluded that a prior decision by a court with jurisdiction precluded subsequent relitigation, even if the prior decision was erroneous and involved federal constitutional issues. Id. 775 P.2d at 517.

IT IS THEREFORE ORDERED:

The state's motion to dismiss at Docket No. 18 is GRANTED. This court has given Bullwinkle a prior opportunity to amend his complaint to ensure that he had every opportunity to bring the facts and the applicable law to this court's attention. Having thoroughly reviewed the record in this case, I am satisfied that Bullwinkle could not amend his complaint to avoid the bar of Collateral Estoppel. The dismissal in this case is therefore with PREJUDICE.

DATED at Anchorage, Alaska this 28 day of April 1992.

/s/ JAMES K. SINGLETON, JR.
United States District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER H. BULLWINKLE, Plaintiff-Appellant,	)	No. 92-35591
v.	)	D.C.No. CV-91-034-JKS
STATE OF ALASKA, Defendant-Appellee.	)	MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Submitted February 11, 1993**

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

Walter H. Bullwinkle appeals pro se the district court's summary judgment in favor of defendant, the State of Alaska (the "State").[1] The district court held that the issues raised

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

1 The State actually filed a motion to dismiss the action, but the district court, noting that the State relied on materials outside the pleadings, correctly treated the motion as one for summary judgment. See Fed. R. Civ. P. 56(b).

by Bullwinkle had been raised and adjudicated in an earlier action in Alaska state superior court and, therefore, Bullwinkle was barred by the doctrines of res judicata and collateral estoppel from relitigating those issues and claims. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We review the district court's summary judgment de novo. See McGuckin v. Smith, 974 F.2d 1040, 1059 (9th Cir. 1992). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. See Alaska Airlines, Inc., v United Airlines, Inc., 948 F.2d 536, 539 (9th Cir. 1991), cert denied, 112 S. Ct. 1603 (1992).

"'It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" Hoffman Constr. Co. v. Active Erectors & Installers, Inc., 969

F.2d 796, 799 (9th Cir. 1992) (quoting Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)), petition for cert. filed, 61 U.S.L.W. 3420 (U.S. Nov. 18, 1992) (No. 92-869). In Alaska, the doctrine of collateral estoppel "operates to preclude relitigation of issues when the issues have been actually litigated and determined in the first action by a valid and final judgment, and the determination must have been essential to the judgment." DeNardo v. Municipality of Anchorage, 775 P.2d 515, 517 (Alaska) (quotation omitted), cert denied, 493 U.S. 922 (1989).

In November of 1986, the State filed an action in Alaska state superior court to condemn a portion of Bullwinkle's property over which the State claimed an easement. State v. 0.947 Acres, et al., No. 4FA-86-2479 (Alaska Sup. Ct. Sept. 9, 1991). In that action the state court confirmed that the State has a section line easement over Bullwinkle's property. The court held that (1) the Federal Land Policy and Management Act of 1976 did not

revoke the easement; (2) the State was not required to have begun actual construction on the easement in order to accept the easement and that a legislative act was enough to perfect the easement; (3) the easement was not vacated by either the Alaska Railroad Transfer Act of 1982 or the repeal of 1923 Alaska Sess. Laws Ch. 19; (4) the Alaska Territorial Legislature had authority to accept the easement; and (5) the scope of the federal government's conveyance of the easement in question was controlled by state law.

Bullwinkle subsequently initiated this action in federal court. In his second amended complaint, Bullwinkle sought declaratory relief regarding the parties' rights to the land on which the State claimed its easement, i.e., a determination of the validity of the State's easement. Bullwinkle raised the same grounds for his claim as he had in state court in the State's condemnation action.

The record shows that Bullwinkle actually litigated these issues in state court and that the state court rendered a valid final judgment

on them. Moreover, because the purpose of the condemnation action was to acquire land for the widening of a road, the determination that the easement was valid was essential to the state court judgment. Accordingly, the district correctly found that Bullwinkle was precluded by collateral estoppel from relitigating these issues in federal court. See Denardo, 775 P.2d at 517.

Bullwinkle also sought a declaration regarding the extent of his federal land patent in relation to the State's claimed easement. On the surface, this claim appears to differ from the claims Bullwinkle raised previously. Nevertheless, the essential question underlying this claim was whether the State's easement was valid, a question the state court had already answered. Thus, the district court did not err by finding that Bullwinkle was precluded from relitigating this issue in federal court. See id.

Because the record shows that the issues raised by Bullwinkle in this action were litigated in and determined by the Alaska state

court, the district court did not err by granting summary judgment for the State on the ground that Bullwinkle's action is barred by the doctrine of collateral estoppel. See Hoffman Constr. Co., 969 F.2d at 799; DeNardo, 775 P.2d at 517.[2]

AFFIRMED.

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[2] The State contends the district court judgment should be affirmed on the ground Bullwinkle's action is barred by the eleventh amendment to the United States Constitution. We are not convinced, however, that the declaratory and injunctive relief Bullwinkle seeks is tantamount to an award of damages prohibited by the eleventh amendment. See Green v. Mansour, 474 U.S. 64, 73 (1985); Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) (citations omitted). We therefore decline to decide this case on the basis of the eleventh amendment or on any of the other grounds urged by the State.

United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION

701 C Street, Box 34
Anchorage, Alaska 99513

The Secretary of the Interior in 1898, in I.D. 26 466 replied to an order of the Board of Commissioners of Douglas County, Washington, which purported to create section line easements along all section lines in Douglas County.

"There is no showing of either present or future necessity for these roads or that any of them have actually been constructed or that their construction and maintenance is practicable. Whatever may be the scope of the statute under consideration it certainly was not intended to grant a right of way on Public Lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time that such roads may be needed."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA GREENHOUSES, INC. Plaintiff, v. MUNICIPALITY OF ANCHORAGE, et al., Defendants.	Case No. A85-630 Civil BRIEF AMICUS CURIAE OF THE UNITED STATES

By Order filed August 6, 1986, this court invited the United States to submit a brief amicus curiae setting forth the views of the United States on this action. The United States informed the court on October 6, 1986 that it desired to file an amicus brief.

We shall show, based on the clear language of the statute, the language of statutes to be read in pari materia, federal cases interpreting R.S. 2477 and administrative construction that the Supreme Court of Alaska has overestimated the scope of the federal offer in R.S. 2477.

The statute, R.S. 2477, requires actual or, at least, imminent construction. To the extent the Alaska statute purports to accept rights-of-way without any actual or even planned construction, the purported acceptance exceeds the scope of the offer and is invalid.

In any event, it is not at all unusual for federal courts to have to interpret federal statutes in a manner inconsistent with prior state law which remained unchallenged for a long period of time by federal authorities.

Joint Council of Passamaquoddy and Penobscot Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (Indian Nonintercourse Act, 25 U.S.C. 177 applies to Maine Indians despite almost two century long practice that did not.

In sum, R.S. 2477 clearly requires actual construction over the unreserved public lands and no highway easements exist over the section lines here.

T The above excerpts from an exhaustive study of Section Line Easements prepared by Mr. Bruce M. Blandon of the Justice Department is the definitive work on this subject.

STATE OF ALASKA
DEPARTMENT OF LAW
Office of the Attorney General
Box 2170 - Juneau

1962 Opinions of the
Attorney General No. 11

July 26, 1962

Mr. Donald A. McKinnon, Commissioner
Department of Highways
Douglas, Alaska

Attention: Mr. Alfred A. Baca
State Right of Way Agent

Re: Section Line Dedications
An interpretation of Ch. 19,
SLA 1923, Ch. 123, SLA 1951
and Ch. 34, SLA 1953

Dear Mr. McKinnon:

You have asked whether the State has a right of way easement along certain section lines, which can be used for highway purposes without compensation.

If the State has such an easement it must be based upon either Ch. 19, SLA 1923, Ch. 123, SLA 1951 or Ch. 35, SLA 1953. The relevant language of Ch. 19, SLA 1923 states:

> "Section 1. A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective

> strips shall inure to the owner of the tract of which it formed a part by the original survey."

The legislature could not be referring to sections which have passed to private ownership because dedication of easements on private property would be an infringement of vested property rights prohibited by the fifth amendment to the Constitution of the United States. Nor could the territorial legislature legally dedicate an easement in section lines over the public domain. Section 9 of the Alaska Organic Act (48 USCA § 77) reads in part as follows:

> "The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; ..." Cf. Betsch v. Umphroy, 270 Fed. Rep., 45, 38 (1921).

The preserving of an easement in the territory certainly would interfere with the primary disposal of the soil. Since the territorial legislature had no powers not conferred by federal statute, Ch. 19, SLA 1923

cannot be construed as a dedication of right-of-way easements on federal lands.

Ch. 19, SLA 1923 could only be effective to dedicate an easement on land owned by the Territory of Alaska and conveyed subsequent to the approval of the Act of April 6, 1923. However, this question is moot because according to the Bureau of Natural Resources, the Territory of Alaska from the period of its inception until statehood never possessed more than 105,000 acres. It is my understanding that this land is located in small parcels throughout the State and is used for school and public works purposes. It is doubtful if any of this land has ever been conveyed.

Ch. 19, SLA 1923 was included in the 1933 compilation of session laws but was omitted from the last compilation in 1949. All acts not included in the compilation were expressly repealed. Chapter 1, ESLA 1949.

Very truly yours,

GEORGE N. HAYES
ATTORNEY GENERAL

By: Michael H. Holmes
Assistant Attorney General

cc: The Honorable William A. Egan
Governor of Alaska
State Capitol
Juneau, Alaska

STATE OF ALASKA
DEPARTMENT OF LAW
Office of the Attorney General
504 Barnette, Room 228
Fairbanks 99701

September 23, 1982

Ernest L. Woods, Jr., Chief
Real Estate Division
Department of the Army
Alaska District, Corps of Engineers
P. O. Box 7002
Anchorage, Alaska 99510

Re: New Murphy Dome Road

Dear Mr. Woods,

I did appreciate the opportunity to speak with you on the telephone on September 16, 1982. I believe it did assist in helping to delineate any lingering issues pertaining to the New Murphy Dome Road and its simultaneous use by the public and the military.

Your statement that the Department of the Interior's failure to include 44 LD 513 exceptions in the patents at issue constituted a mistake which could be corrected in a court action was something I did take a new look at as I agreed. By sharing the results of that research with you it may help clarify the State's position in this area.

To begin this discussion I would like to restate the important principle that a patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which a holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose. 2, The American Law of Mining, §1.29 at 357, cited in: United States v. Eaton Shale Company, 433 F.Supp. 1256, 1267 (D. Colo. 1977). The issuance of the patent creates a presumption that all requisite steps and requirements of law and departmental regulations have been fully complied with. Id., 433 F.Supp at 1267. When a patent for public land has been issued, recorded, and accepted, all authority or control over the land or the title passes away from the land department, and neither the executive nor the land department has any power to recall, cancel, anull or set aside the patent. 73 CJS Public

In any event, if the United States by request of its military arms saw fit to seek cancellation of the patent because of an

alleged unilateral mistake it must be borne in mind that a patent cannot be attacked collaterally, but only by direct proceedings. Matthews v. Barker, 30 F.Supp. 464, 465 (D. Idaho 1938), citing: Lee v. Johnson, 166 U.S. 48, 6 Sup.Ct. 249, 29 L.Ed. 570 [other citations omitted]. In Clark v. Parsons, 25 P.2d 176 (Colo. 1933), for instance, where the government inadvertently admitted to exclude a lode location from a homestead patent, the patent could only be reformed or cancelled without the patentee's consent by direct proceedings. The court ruled: "It [the patent] also conveys title of the entire homestead tract. Only by a direct proceeding brought by the government could the patent have been reformed or cancelled without Clark's [patentee's] consent." Id., p. 176. Yet, given the dates of issuance of these patents, the time has long since past for the United States to challenge them:

> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents. 43 USCA §1166.

Under the provisions of this statute (first enacted in 1891), suits by the United States to vacate and annul any patent shall be brought within six years after the date of issuance of such patent. The statute protects a patent whether or not the executive agency had authority to issue it. United States v. Chandler-Dunbar Water Power Company, 209 U.S. 447, 450, 28 S.Ct. 579, 52 L.Ed. 881 (1908), cited in: The United States v. Eaton Shale Company, 433 F.Supp. 1256, 1268 (D. Colo. 1977). It is the purpose of the statute to render patents to real property and interest therein more secure and marketable.

> The statute extinguishes any right the government may have in the land, and vests a perfect title in the adverse holder after six years from the date of the patent. [Citations omitted] 433 F.Supp., supra, at 1268.

Very truly yours,
WILSON L. CONDON
ATTORNEY GENERAL

By: Larry D. Wood
Assistance Attorney General

cc: Joe Pinto, Land Management Officer
Div. Land & Water Management
Dept. of Natural Resources

Harold Cameron, Right-of-Way Agent
Northern Region, DOT/PF